2-10-2015

State v. Smith Appellant's Reply Brief Dckt. 41661

IN THE SUPREME COURT OF THE STATE OF IDAHO

STATE OF IDAHO, Plaintiff-Respondent, v. KENNETH RANDALL SMITH, Defendant-Appellant.	)	NO. 41661 KOOTENAI COUNTY NO. CR 2012-17350 REPLY BRIEF

REPLY BRIEF OF APPELLANT

APPEAL FROM THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE COUNTY OF KOOTENAI

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STATEMENT OF THE CASE

Nature of the Case

Kenneth Randall Smith appealed from the district court's judgments in two separate cases. In the first case (the possession case), he asserted on appeal that the district court erred when it denied his motion to suppress. In the second case (the aggravated assault case), he asserted on appeal that the district court erred when it denied his motion to suppress, and that it abused its discretion when it denied his motion in limine and permitted the State to impeach his credibility with his prior conviction for burglary.

In its Respondent's Brief, the State argued that Mr. Smith did not show that the district court erred when it denied his motion to suppress in the possession case. (Resp. Br., pp.8-15.) The State also argued that Mr. Smith did not show that the district court erred when it denied his motion to suppress in the aggravated assault case (Resp. Br., pp.16-20), and that he did not show the district court abused its discretion when it allowed the State to admit evidence of his prior burglary conviction to impeach him (Resp. Br., pp.20-23).

This Reply Brief is necessary to address the State's argument that, with respect to the motion to suppress in the aggravated assault case, Mr. Smith's implied consent to the blood draw was valid because there was no evidence he revoked his implied consent. Contrary to the State's representation of the facts, the parties stipulated that Mr. Smith did not consent to the blood draw. Idaho's implied consent statute does not justify a warrantless blood draw where the driver refuses to consent. Thus, under the totality of the circumstances, Mr. Smith did not voluntarily consent to the blood draw.

Because Mr. Smith did not voluntarily consent to the blood draw, the officers needed a warrant before they could perform the blood draw. The officers did not obtain a warrant, and the involuntary blood draw therefore violated Mr. Smith's constitutional rights. Thus, the district court erred when it denied the motion to suppress in the aggravated assault case.

Statement of the Facts and Course of Proceedings

The statement of the facts and course of proceedings were previously articulated in Mr. Smith's Appellant's Brief. They need not be repeated in this Reply Brief, but are incorporated herein by reference thereto.

ISSUES

1. Did the district court err when it denied Mr. Smith's motion to suppress in the possession case?

2. Did the district court err when it denied Mr. Smith's motion to suppress in the aggravated assault case?

3. Did the district court abuse its discretion when it denied Mr. Smith's motion in limine in the aggravated assault case and permitted the State to impeach his credibility with his prior conviction for burglary?

ARGUMENT

I.

The District Court Erred When It Denied Mr. Smith's Motion To Suppress In The Possession Case

Mr. Smith asserts that the district court erred when it denied his motion to suppress in the possession case. The traffic stop was unlawfully extended. Officer Cwik's *Terry*[1] frisk of Mr. Smith's jacket was unlawful, and even if the *Terry* frisk of the jacket were valid, the removal of the canister from the sock exceeded the scope of the *Terry* frisk. Mr. Smith was not given *Miranda*[2] warnings despite being in custody, and his statements during the traffic stop in response to Officer's Cwik's questioning about the items in the canister should therefore be suppressed. Because the State's argument concerning the motion to suppress in the possession case is not remarkable, no further reply is necessary. Accordingly, Mr. Smith refers the Court to pages 13-26 of his Appellant's Brief.

II.

The District Court Erred When It Denied Mr. Smith's Motion To Suppress In The Aggravated Assault Case, Because The Warrantless Blood Draw Violated The Fourth Amendment

A. Introduction

Mr. Smith asserts that the district court erred when it denied his motion to suppress in the aggravated assault case, because the warrantless blood draw violated the Fourth Amendment. Mr. Smith did not consent to the blood draw, and Idaho's

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[1] *Terry v. Ohio*, 392 U.S. 1 (1968).
[2] *Miranda v. Arizona*, 384 U.S. 436 (1966).

implied consent statute does not justify a warrantless blood draw from a driver who refuses to consent. Thus, under the totality of the circumstances, Mr. Smith did not voluntarily consent to the blood draw. Because Mr. Smith did not voluntarily consent to the blood draw, the officers needed a warrant before they could perform the blood draw. The officers did not obtain a warrant, and the involuntary blood draw therefore violated Mr. Smith's constitutional rights. Thus, the district court erred when it denied the motion to suppress in the aggravated assault case.

The State argues that Mr. Smith's implied consent to the blood draw was valid, because the record contains no evidence that he revoked his implied consent. (Resp. Br., pp.16-19.) However, the parties stipulated that Mr. Smith did not consent to the blood draw. (Tr., May 31, 2013, p.40, Ls.9-14.) The stipulation is broad enough to encompass the fact that Mr. Smith refused to consent to the blood draw.

B. The Warrantless Blood Draw Violated The Fourth Amendment Because Mr. Smith Did Not Voluntarily Consent To The Blood Draw Under The Totality Of The Circumstances

Mr. Smith asserts that the warrantless blood draw violated the Fourth Amendment because he did not voluntarily consent to the blood draw under the totality of the circumstances. Mr. Smith did not consent to the blood draw. (Tr., May 31, 2013, p.40, Ls.9-14.) The Idaho Supreme Court recently held that "an implied consent statute such as Washington's and Idaho's does not justify a warrantless blood draw from a driver who refuses to consent . . . or objects to the blood draw." *State v. Halseth*, 157 Idaho 643, ___, 339 P.3d 368, 371 (2014).[3] Thus, under the totality of the

[3] The Idaho Supreme Court also recently held that it would no longer apply "Idaho's implied consent statute as an irrevocable per se rule that constitutionally allowed forced

circumstances, Mr. Smith did not voluntarily consent to the blood draw. *See Missouri v. McNeely*, 569 U.S. ___, 133 S. Ct. 1552, 1556 (2013); *Schneckloth v. Bustamonte*, 412 U.S. 218, 227 (1973).

Contrary to the State's representation of the facts in this case, the parties stipulated that Mr. Smith did not consent to the blood draw. The State contends that Mr. Smith "argued that he did not affirmatively consent to the blood draw." (Resp. Br., p.18 (citing Tr., May 31, 2013, p. 40, Ls.5-14).) But the passage cited by the State, as made clear in the Appellant's Brief (App. Br., p.28), actually contains the parties' stipulation that Mr. Smith did not consent to the blood draw. At the motion to suppress hearing, counsel for Mr. Smith informed the district court that "Mr. Smith didn't consent to the blood draw. That's also a stipulation between the parties." (Tr., May 31, 2013, p.40, Ls.9-11.) The district court stated, "Unless there was an implied consent," and counsel replied, "That's correct." (Tr., May 31, 2013, p.40, Ls.12-14.)

"Stipulations are the agreements of, and may be relied upon as, undisputed proof." *State v. Hochrein*, 154 Idaho 993, 1000 (Ct. App. 2013) (citing *Reding v. Reding*, 141 Idaho 369, 373 (2005); *State v. Trimming*, 89 Idaho 440, 444 (1965)). "Stipulations are a form of judicial admission. A judicial admission obviates the necessity for proof of facts within the ambit of a distinct and unequivocal admission or stipulation so made." *Perry v. Schaumann*, 110 Idaho 596, 598 (Ct. App. 1986) (citation and internal quotation marks omitted). "Admissions in open court by a prosecuting attorney, or by the counsel for the accused, are conclusive." *Trimming*, 89 Idaho at 445.

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warrantless blood draws." *State v. Wulff*, 157 Idaho 416, ___, 337 P.3d 575, 582 (2014) (overruling *State v. Diaz*, 144 Idaho 300 (2007); *State v. Woolery*, 116 Idaho 368 (1989)).

"Admissions by the prosecuting attorney of material facts are to be construed in favor of the accused." *Id.*

Here, the parties made an oral stipulation. (*See* Tr., May 31, 2013, p. 40, Ls.9-14.) "Oral stipulations in the presence of the court and on the record are traditionally held binding." *Kirk v. Ford Motor Co.*, 141 Idaho 697, 703 (2005). "A stipulation is a contract. The enforceability of an oral stipulation is determined by contract principles." *Id.* (internal quotation marks omitted); *see Hochrein*, 154 Idaho at 1000. "An enforceable contract requires distinct understanding common to both parties." *Kirk*, 141 Idaho at 703 (internal quotation marks omitted).

The parties in this case stipulated that Mr. Smith did not consent to the blood draw. (Tr., May 31, 2013, p. 40, Ls.9-14.) Pursuant to the above case law, that stipulation is undisputed proof that Mr. Smith did not consent. *See Trimming*, 89 Idaho at 444; *Hochrein*, 154 Idaho at 1000.

The stipulation is broad enough to encompass the fact that Mr. Smith refused to consent to the blood draw. The context of the stipulation was the dispute over whether Idaho's implied consent statute would justify the blood draw even though Mr. Smith did not consent. Before the State entered into the stipulation, it argued, based on *State v. Wheeler*, 149 Idaho 364 (Ct. App. 2010), that "protests to the blood draw in the current case do not invalidate the consent." (R., p.172.) The State further contended, "Having received the benefit of the bargain of implied consent, the driver may not void consent already given." (R., p.172.) At the motion to suppress hearing, the State argued that the district court was bound to follow cases such as *Wheeler*, "taking our factual situation that we have here and saying that's reasonable." (Tr., May 31, 2013, p.43,

Ls.12-19.) Those arguments indicate that the State, in the stipulation, agreed to the fact that Mr. Smith refused to consent to the blood draw. *See State v. Ellis*, 155 Idaho 584, 588 n.3 (Ct. App. 2013) ("Ellis's motion to suppress indicates that Ellis agreed to the fact that a Fourth Amendment waiver was included in his parole agreement".).

Mr. Smith also suggested that he refused to consent. At the motion to suppress hearing, he asserted,

> what we have here is whether or not an individual can withdraw their consent, can say, "Well, I know that on the roadways I've given implied consent to give blood. But at some point I'm not agreeing to that anymore. I don't want the State to draw blood," and whether that's something that you can do and whether the states are able to modify by statute the ability of a defendant to revoke consent. And we don't think that the states can.

(Tr., May 31, 2013, p.42, L.24 – p.43, L.7.)

The parties' discussion of whether implied consent may be withdrawn indicates they had a common distinct understanding that Mr. Smith refused to consent to the blood draw. *See Kirk*, 141 Idaho at 703. If the stipulation did not contemplate that Mr. Smith refused to consent, there would have been no need for the parties to discuss whether implied consent may be withdrawn. Further, to the extent that the stipulation is an admission by the prosecuting attorney of material facts, it should be construed in favor of Mr. Smith. *See Trimming*, 89 Idaho at 445; *Perry*, 110 Idaho at 598. Thus, the stipulation that Mr. Smith did not consent to the blood draw is broad enough to encompass the fact that Mr. Smith refused to consent to the blood draw.

Because the parties stipulated that Mr. Smith did not consent to the blood draw, Mr. Smith did not elaborate on his refusal. The State argues that there is no evidence that Mr. Smith revoked or withdrew his implied consent. (Resp. Br., p.18.) But a

stipulation "obviates the necessity for proof of facts within the ambit" of the stipulation. *Perry*, 110 Idaho at 598 (internal quotation marks omitted). Because the parties stipulated that Mr. Smith did not consent to the blood draw (Tr., May 31, 2013, p. 40, Ls.9-14), Mr. Smith was not required to present evidence that he withdrew his consent or otherwise refused to consent. *See Perry*, 110 Idaho at 598. Thus, Mr. Smith did not elaborate on his refusal. (*See, e.g.*, Tr., May 31, 2013, p. 40, L.5 – p.42, L.13.) In the absence of a stipulation, Mr. Smith may have offered additional evidence. The State should not be heard to complain now that Mr. Smith did not present evidence showing that he did not consent to the blood draw, after it agreed to a stipulation that obviated the need to present such evidence. *See Perry*, 110 Idaho at 598.

In fact, because the stipulation advantaged the State by narrowing the disputed issues in the motion to suppress, judicial estoppel precludes the State from seeking, as it has in its Respondent's Brief, a position incompatible with the stipulation. "The doctrine of judicial estoppel sounds in equity and is invoked at the discretion of the court." *McCallister v. Dixon*, 154 Idaho 891, 894 (2012). "Judicial estoppel precludes a party from advantageously taking one position, then subsequently seeking a second position that is incompatible with the first." *Hoagland v. Ada County*, 154 Idaho 900, 912 (2005). "The policy behind judicial estoppel is to protect the integrity of the judicial system, by protecting the orderly administration of justice and having regard for the dignity of the judicial proceeding." *Id.* (internal quotation marks omitted). "It is intended to prevent parties from playing fast and loose with the legal system." *Id.*

As the district court indicated, the stipulation narrowed the contested issues in the motion to suppress to "solely a legal issue on the implied consent." (*See*

Tr., May 31, 2013, p.39, Ls.7-9.) This narrowing of the issues was a consideration or advantage given to the State, because the State (and Mr. Smith) received the benefit of not having to argue additional issues. *See Boise Tower Associates, LLC v. Hogland*, 147 Idaho 774, 780 (2009) (explaining that some consideration is a necessary element of a valid contract such as a stipulation agreement, and receiving a benefit is consideration). Because the State advantageously took the position that Mr. Smith did not consent to the blood draw, it cannot now seek a second position that is incompatible with that stipulation. *See Hoagland*, 154 Idaho at 912. Thus, judicial estoppel precludes the State from seeking a position, as it has in its Respondent's Brief, incompatible with the stipulation.

Contrary to the State's representation of the facts, the parties stipulated that Mr. Smith did not consent to the blood draw. (Tr., May 31, 2013, p. 40, Ls.9-14.) The stipulation is broad enough to encompass the fact that Mr. Smith refused to consent to the blood draw. As discussed above, the *Halseth* Court held that Idaho's implied consent statute does not justify a warrantless blood draw from a driver who refuses to consent. *Halseth*, 157 Idaho at ___, 339 P.3d at 371. Thus, under the totality of the circumstances, Mr. Smith did not voluntarily consent to the blood draw. *See McNeely*, 569 U.S. ___, 133 S. Ct. at 1556; *Schneckloth*, 412 U.S. at 227.

Because Mr. Smith did not voluntarily consent to the blood draw, the officers needed a warrant before they could order the blood draw. *See State v. LaMay*, 140 Idaho 835, 837-38 (2004). The officers did not obtain a warrant (*see* Tr., May 31, 2013, p.40, Ls.5-9), and the involuntary blood draw therefore violated Mr. Smith's constitutional rights. *See LaMay*, 140 Idaho at 837-38. Thus, the district court erred

when it denied Mr. Smith's motion to suppress in the aggravated assault case. The judgment of conviction in the aggravated assault case should be vacated with respect to the driving under the influence charge, the order denying the motion to suppress should be reversed, and that portion of the aggravated assault case should be remanded to the district court for further proceedings.

III.

The District Court Abused Its Discretion When It Denied Mr. Smith's Motion In Limine In The Aggravated Assault Case And Permitted The State To Impeach His Credibility With His Prior Conviction For Burglary

Mr. Smith asserts that the district court abused its discretion when it denied his motion in limine in the aggravated assault case and permitted the State to impeach his credibility with his prior conviction for burglary, because the district court did not act consistently with the applicable legal standards. The district court did not act consistently with the applicable legal standards because it did not weigh the probative value of the evidence of the prior conviction against its unfairly prejudicial effect. Mr. Smith further asserts that the State will be unable to show that the district court's error in denying the motion in limine on the burglary conviction is harmless. Because the State's argument concerning the motion in limine is not remarkable, no further reply is necessary. Accordingly, Mr. Smith refers the Court to pages 34-41 of his Appellant's Brief.

CONCLUSION

For the above reasons, as well as the reasons in the Appellant's Brief, Mr. Smith respectfully requests that this Court vacate his judgment of conviction in the possession case, reverse the district court's denial of the motion to suppress, and remand the possession case to the district court for further proceedings. Mr. Smith also respectfully requests that this Court vacate his judgment of conviction in the aggravated assault case with respect to the driving under the influence charge, reverse the order denying the motion to suppress, and remand that portion of the aggravated assault case to the district court for further proceedings. Further, Mr. Smith respectfully requests that this Court vacate the rest of the judgment of conviction in the aggravated assault case and remand his case for a new trial.

DATED this 10th day of February, 2015.

BEN P. MCGREEVY
Deputy State Appellate Public Defender

CERTIFICATE OF MAILING

I HEREBY CERTIFY that on this 10th day of February, 2015, I served a true and correct copy of the foregoing APPELLANT'S REPLY BRIEF, by causing to be placed a copy thereof in the U.S. Mail, addressed to:

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